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No. 82-1594

In the Supreme Court of the United States

October Term, 1982

FREDERICK P. MILO,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Respondent would agree with the Statement of the Case as set forth by Petitioner except the following matters which it takes exception to:

(1) The evidence clearly supported the view that the actual killer was part and parcel of the conspiracy that was set in motion by Petitioner.

(2) The State presented evidence both from its own medical experts and through cross-examination of Petitioner's medical expert that the conduct of Petitioner was not the product of insanity.

(3) The Prosecutor's questions on cross-examination were within the proper scope of cross-examination and did not constitute a comment on Petitioner's failure to testify. The questions were an attempt to cast doubt on the opinion of the medical expert based on undermining the factual basis for his opinion.

ARGUMENT

PETITIONER'S FIRST REASON FOR GRANTING THE WRIT

The Interaction of Fifth Amendment Self-Incrimination Guarantees With Presentation of the Insanity Defense Needs Explanation by This Court to Assure Constitutional Rights Are Not Withdrawn From Defendants Who Present Defenses but Do Not Testify; This Result Conflicts With Other Courts' Rulings.

PETITIONER'S SECOND REASON FOR GRANTING THE WRIT

Introduction of Accurate Videotaped Evidence on Behalf of a Criminal Defendant Should Not Alter the State's Duty to Refrain From Griffin Comments; Such Alteration Is a Penalty Creating an Impermissible Choice Between Fifth Amendment Rights and Sixth Amendment Rights to Present a Full Defense.

PETITIONER'S THIRD REASON FOR GRANTING THE WRIT

Authorized Use of Videotaped Interviews Cannot Form the Basis for a State Appellate Court to Deem an Accused Waived His Griffin Rights; Such Ex Post Facto Waiver Is Neither Knowing, Intelligent, nor Voluntary.

For purposes of clarity the Respondent has consolidated its response to Petitioner's Reasons for Granting the Writ I, II and III.

On February 9, 1981, the Petitioner filed a written plea of not guilty by reason of insanity. As part of this pleading, Petitioner's Counsel indicated that as a result

of an interview with the Petitioner on January 28, 1981, Dr. Emmanuel Tanay had concluded that Petitioner was insane concerning the crime charged. It was subsequently learned through Dr. Tanay and other psychiatrists that the Petitioner was admitting participation in the plan to kill his "brother" (Dean).

Dr. Tanay, following his insanity determination from the Petitioner's interview of January 28, 1981, conducted additional interviews of audio and videotapes. Approximately six hours of these tapes involved direct interviews with the Petitioner.

Prior to the testimony of Dr. Tanay, the State objected to the procedure which allowed Dr. Tanay to televise prerecorded portions of the Petitioner's statements in front of the jury. The State offered various grounds to exclude the playing of these videotapes, including the fact that the videotapes were made after Dr. Tanay's preliminary determination of insanity. The State did not object to the Respondent following the normal procedure of allowing a psychiatrist to relate what the Petitioner had said relevant to the basis for the psychiatric opinion.

The court indicated that the jury would be allowed to view the videotaped interviews of the Petitioner. The trial court stated that the purpose of its admission was to permit the jury to evaluate the basis upon which Dr. Tanay rendered his opinion that the Petitioner was insane at the time he committed the crime. The trial court further ruled that as a precondition of the videotape's admission, the jury would be instructed that they should not consider the tape as the Petitioner's testimony because he was not under oath and was not subject to cross-examination. Petitioner's counsel did not object to this condition indicating that this was the procedure followed in the first trial.

The questioning of Dr. Tanay constituted an attempt to impeach the doctor's testimony and to attack the credibility of the taped statements upon which he relied. The questions served to connect the trial court's instructions with the doctor's testimony. The doctor testified that, despite his original diagnosis, the subsequent interview was crucial to his opinion. For that reason, it should be played for the jury. The State then attempted to explore the potential unreliability of that foundation and his diagnosis.

Dr. Tanay and his videotapes were crucial factors in the Petitioner's defense. During cross-examination, the State used the court's instructions as the foundation for its questions. The State emphasized that Petitioner was not under oath when he gave his story to Dr. Tanay, and that the Petitioner was not cross-examined in the interviews shown to the jury. It was very important that the jury be aware of these factors when weighing the credibility of Dr. Tanay and the credibility of the videotapes upon which he based his opinion. It was with this purpose the questions were asked; not as a comment on Petitioner's failure to testify, but as the only vehicle available to attack the diagnosis of Dr. Tanay.

During closing arguments, the State obviously commented on the state of the evidence. Taken in context, the State's argument in the instant case, was a comment on the evidence before the jury, and how this evidence related to the trial court's instructions.

The statements of the Prosecutor were not of such a character that the jury would have naturally taken them to be a comment on Petitioner's failure to testify. *Knowles v. U. S.*, 224 F.2d 168, 170 (10th Dist. 1955), *State v. Cooper*, 52 Ohio St. 2d 163, 173 (1977). Nor were they such to

be inflammatory or prejudicial to the rights of the Defendant. *State v. Wade*, 53 Ohio St. 2d 182, 186 (1978).

The Prosecution had the right to examine all aspects of the insanity defense of Petitioner. This examination included all reasonable methods to show that the Petitioner was not insane at the time of the commission of his brother's murder. The questions regarding the videotape and the comments on closing arguments were attempts to undermine the Petitioner's insanity defense, not to comment on his failure to testify.

PETITIONER'S FOURTH REASON FOR GRANTING THE WRIT

Prosecutorial Argument Implying Defense Counsel's Belief in His Own Client's Guilt and Stating Defense Counsel Was Himself Deceived by His Client's Defense Is an Insidious Affront to Primary Sixth Amendment Values Not Yet Examined by This Court.

Petitioner cites a plethora of purported prosecutorial improprieties, however, he failed to object to all but one (T. Vol. IV, p. 57). The State respectfully submits that any possible error has been waived by failure to object.

The comment quoted by Petitioner at T. Vol. IV, p. 36, is taken out of context and in no fashion is an improper comment. No objection was made, either.

The comment quoted at T. Vol. IV, p. 46, was not objected to. Furthermore, Petitioner cannot use its version of defense alchemy to try to change innocuous statements of the prosecution into opprobrious, prejudicial ones. The State can point out the failure on the part of defense counsel to subpoena witnesses or introduce evidence to support the theory of its case. Thus, the Prosecution is not prevented from commenting upon that failure in closing argument. *State v. Lane*, 49 Ohio St. 2d 77, 86 (1976).

Petitioner has taken editorial license with the comments at T. Vol. IV, pp. 55-57. The sentences are taken totally out of context. Numerous sentences and paragraphs are interspersed between the comments that Petitioner grouped together thus, giving a deceptive picture of what was said. A full reading of the text will clearly show that no attempt was made to use Mr. Pappas as a witness against his client in violation of the Sixth Amendment.

Although Petitioner relies on *Mostade v. Engale*, 507 F. Supp. 402 (N.D. Ohio 1981), in support of the above issue, the State respectfully submits that the comments were not improper, nor was the proof short of overwhelming in the instant case.

In particular, the Prosecutor did not make a direct personal comment on Petitioner's guilt.

> "One thing I can tell you is that if you don't convict the Defendant in this case of Aggravated Murder, I know in my heart I have not said the right words." (T. Vol. IV, p. 60).

The State respectfully submits that in instances where opinions of personal guilt are expressed which are predicated upon the evidence, they are not deemed prejudicially erroneous. *State v. Stephens*, 24 Ohio St. 2d 76, 83 (1970).

Petitioner failed to properly object, and the prosecutorial comments were properly based upon evidence overwhelming in nature. Furthermore, prosecutorial remarks must have been so offensive and prejudicial as to have denied Petitioner a fair trial. *State v. Carver*, 30 Ohio St. 2d 280, 291 (1972).

CONCLUSION

The Respondent respectfully requests this Court, pursuant to the argument offered, to deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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